Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

OLMEDO EMILIO ROMERO,
Petitioner,

v.

JOHN ASHCROFT, ATTORNEY GENERAL, and UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES (USCIS) DISTRICT DIRECTOR,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For The Third Circuit
(3rd Circuit No. 04-1899)
Before Circuit Court Judges: Smith, Fisher and Stapleton

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether the Board of Immigration Appeals (Board or BIA) failed to follow its own published regulations for review by sustaining an appeal filed by the Department of Homeland Security (DHS), thereby reversing the decision of the Immigration Judge granting the petitioner a section 212(c) waiver.

(2) Whether a federal court of appeals has jurisdiction to review a challenge to a Board's final order of removal where the Petitioner is inadmissible for having committed a crime involving moral turpitude pursuant to section 212(a)(2)(i)(I) of the Immigration and Nationality Act.

LIST OF PARTIES

All Parties appear in the caption of the case on the cover page.

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CITATION OF THE OFFICIAL AND UNOFFICIAL REPORTS

The order of the Circuit Court was entered on June 2, 2004 under the caption Romero v. Ashcroft, No. 04-1899 (3rd Cir. 2004). The order is attached hereto as Appendix A-1.

STATEMENT OF JURISDICTION

The Circuit Court issued an order denying the petition for review on June 2, 2004 affirming the order of removal entered by the United States Board of Immigration Appeals. The Circuit Court granted the Government's motion to dismiss and held the Circuit Court lacked subject-matter jurisdiction. Jurisdiction is vested in this Court pursuant to 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1252(c)(2)(C):

Orders against criminal aliens. Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in § 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by § 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by § 1227(a)(2)(A)(i) of this title.

STATEMENT OF CASE

Petitioner, Olemdo Emilio Romero, a 46 year old

native of Ecuador, entered the United States with his parents on February 13, 1972 as a 15 year old child. The petitioner completed his education in the United States after which he enlisted in the United States Army in November 1980. The petitioner was stationed in Germany and, it was while serving in Germany, that the petitioner was arrested on January 19, 1984 and charged with the sexual assault of an adult woman. The petitioner was sentenced to a 4 year prison term of which he served 37 months and was overseen by a Probation Officer for the remaining 11 months of his sentence. The petitioner received a dishonorable discharge from the Army. The petitioner subsequently married and raised a step-daughter as if his own. The petitioner maintained employment in order to support his family and together the petitioner and his wife formed the basis of their close-knit family unit which also included extended family residing lawfully in the United States.

The petitioner was subsequently served with a Notice to Appear on August 1, 2002 and was charged with being subject to removal due to his criminal conviction. The petitioner was placed in proceedings before an Immigration Judge within the jurisdiction of the Newark, New Jersey Executive Office for Immigration Review. On December 13, 2002, the petitioner submitted to the Immigration Judge an application for relief under the provisions of section 212(c) the Immigration and Nationality Act (Act or INA). The petitioner and his witnesses presented testimony during the Individual Merits Hearing on March 31, 2003. At the conclusion of the Hearing, the Immigration Judge granted the requested relief and provided a detailed decision, a copy of which is attached hereto as A-26. The Immigration Judge remarked that the consideration of a section 212(c)

waiver is the "ultimate act of discretion" and the "ultimate act of humanity" by an Immigration Judge and involves the balancing of equities relating to many aspects of an alien's life. (IJ Decision at page A-31). The Judge very poignantly noted that "one's life is in the Judge's hands." (Ibid.).

The decision of the Immigration Judge is very clear and is reflective of the decision-making process involved in granting such a waiver. The Judge remarked on the evidence of rehabilitation shown by the petitioner, in that the criminal offense occurred some 20 years ago, the long and steady employment record of the petitioner, as well as the proofs offered of the filing of Income Tax Returns, and the dedication of petitioner to his family. (IJ Decision at page A-33). The Immigration Judge commented on the close family relationships between the petitioner and his wife and stepdaughter and of the extended family residing in the United States. (IJ Decision at page A-34). Many of petitioner's siblings were present in Immigration Court to provide testimony as was his citizen mother with whom the petitioner has a special and close relationship. The Immigration Judge wrote that he witnessed the love and affection between the petitioner and his family members and he believed it to be genuine. The Judge was likewise affected by the showing of support as some 30 additional people attended the hearing in support of the petitioner. (IJ Decision at page A-35). The Immigration Judge weighed the positive and negative factors and despite the seriousness of the criminal conviction, granted the petitioner a section 212(c) waiver.

The Department of Homeland Security (DHS) appealed to the Board, the basis of the appeal being the

contention that the petitioner did not warrant a favorable exercise of discretion. On March 11, 2004, the Board sustained the appeal and vacated the decision of the Immigration Judge. The petitioner was ordered removed to Ecuador.

A petition for review was then filed with the United States Court of Appeals for the Third Circuit and was docketed on April 2, 2004. The Circuit Court had jurisdiction pursuant to 8 U.S.C. § 1252(b)(2) which provides for the petition for review to be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The Government submitted a motion to dismiss to the Circuit Court and the Circuit Court granted the motion on June 2, 2004. This petition followed.

ARGUMENT

I. THE BOARD OF IMMIGRATION APPEALS (BOARD) FAILED TO FOLLOW ITS OWN PUBLISHED REGULATIONS FOR REVIEW BY SUSTAINING AN APPEAL FILED BY THE DEPARTMENT OF HOMELAND SECURITY, THEREBY REVERSING THE DECISION OF THE IMMIGRATION JUDGE GRANTING PETITIONER A SECTION 212(c) WAIVER.

Section 212(c) of the INA provides:

Aliens lawfully admitted for permanent residence who temporarily proceed abroad

> voluntarily and are not under an order of deportation and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to certain specified grounds of exclusion.

8 U.S.C. § 1182(c)(1994)(repealed 1996).[1]

Neither the language of the statute nor the relevant regulations establish criteria by which to weigh applications for discretionary relief from deportation. See 8 U.S.C. § 1182(c); 8 C.F.R. § 213.3 (1990).

The Board has determined the factors which are pertinent for review in order to evaluate whether the exercise of discretion under section 212(c) of the Immigration and Nationality Act is warranted. Matter of C-V-T-, Interim Decision 3342 (BIA 1998). The Board in Matter of Marin, 16 I & N Dec. 581 (BIA 1978), outlined the following framework for an equitable application of discretionary relief, including but not limited to:

> Favorable considerations have been found to include such factors as family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred while the respondent was of young age), evidence

[1] Section 212(c) of the INA was repealed in its entirety by §304(b) of the Illegal Immigration Reform and Responsibility Act of 1996 (IIRIRA), 110 Stat. 3009-546, and was replaced with another discretionary form of relief provision, INA §240A, cancellation of removal.

> of hardship to the respondent and family if deportation occurs, service in this country's Armed Forces, a history of employment, the existence of property and business ties, evidence of value and service to the community, proof of a genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character.

Matter of Marin, supra. (internal citations omitted).

The applicant bears the burden of demonstrating that he merits section 212(c) relief from removal. Id. at 582-83. The Board has long held that the Immigration Judge is required to balance the positive and adverse matters to determine whether discretion should be favorably exercised. Matter of Marin, supra.; Matter of Buscemi, 19 I & N Dec. 628 (BIA 1988); see also Matter of Roberts, Interim Decision 3148 (BIA 1991).

In Matter of C-V-T-, the Board reviewed the decision of an Immigration Judge who ordered respondent removed and denied the application for cancellation of removal. The respondent was a 42 year old native of Vietnam who entered the United States as a refugee in 1983 and became a lawful permanent resident in 1991. The respondent was later convicted of fourth degree charges involving a controlled substance. The respondent was sentenced to 90 days in jail. The Board determined that it is uncontested that the respondent was statutorily eligible for cancellation of removal under section 240A. The Board further determined that the respondent presented significant equities, among which is

his continued residence in this country for 15 years, stable employment history, volunteer work, his learning of the English language and the fact that his criminal conviction had been his only contact with law enforcement. The Board reasoned that the facts of the case mitigated the seriousness of the respondent's conviction. The Board held that "considering the totality of the evidence before us, we find that the respondent has adequately demonstrated that he warrants a favorable exercise of discretion and a grant of cancellation of removal under section 240A of the Act." Matter of C-V-T-, supra. The Board sustained the appeal and granted the respondent cancellation of removal.

Likewise, in Matter of Arreguin de Rodriguez, Interim Decision 3247 (BIA 1995), the Board sustained the appeal of the respondent and granted a waiver of inadmissibility under section 212(c) of the Act. This respondent, a 41 year old native of Mexico entered the United States in 1975 as an immigrant at the age of 17. In 1993, the respondent was convicted on charges of importing marijuana and placed in exclusion proceedings. The Immigration Judge determined that the respondent did not warrant an exercise of discretion and ordered her deported to Mexico. The respondent appealed and argued that the Immigration Judge erred in his evaluation of the equities of her case. The Board, in its review of this matter, found the respondent had presented the following significant equities: her efforts toward rehabilitation and acceptance of the responsibility of her crime; working towards her GED while incarcerated; no infractions while in prison; her long residence in the United States; and her five United States citizen children (two being minors and the remaining three being adult children). The Judge had found that the

respondent had little to show for her residence in the United States. The Board disagreed. The respondent's appeal was sustained and the 212(c) waiver granted.

There must be a balancing of the social and humane considerations presented in an alien's favor against the adverse factors evidencing his undesirability as a permanent resident. Matter of Marin, supra.; see also Matter of Roberts, supra. However, the absence of several positive factors should not be automatically construed as negative elements for an objective review of the totality of the circumstances surrounding each case must be performed. See Diaz-Resendez v. INS, 960 F.2d 493, 496 (5th Cir. 1992)(the Court holding that the Board did not weigh serious positive equities and abused its discretion in denying section 212(c) relief to Diaz-Resendez thereby vacating the Board's decision and remanding for reconsideration). A respondent's lengthy criminal history requires a showing of unusual or outstanding equities in this country. Matter of Burbano, 20 I & N Dec. 872 (BIA 1994), citing Matter of Buscemi, supra. In Burbano there was lengthy discussion concerning Burbano's criminal offenses which consisted of a crime involving moral turpitude within 5 years of entry into the United States; two other crimes of moral turpitude, not arising out of a single scheme; and a controlled substance violation. Moreover, Burbano had no close family ties in the United States, no significant employment history, and a lack of credibility during his testimony at his hearing before the Immigration Judge. Therefore, Burbano's appeal was dismissed following an analysis of the positive and adverse factors.

The instant petitioner's case is clearly distinguished by that of Burbano in the existence and presentation of his

positive and adverse factors and more closely follows the facts of Matter of C-V-T-, supra. and Matter of Arreguin, supra. The instant petitioner demonstrated the following equities: his continuous residence in the United States since his entry in 1972 as a lawful permanent resident; the fact that he entered this country as a fifteen year old child, thereby spending his formative and tender years in the United States; and his close and significant family ties in this country, consisting of his citizen wife and citizen stepdaughter, his United States citizen mother, and citizen and lawful permanent resident siblings; his steady and long employment history; filing of Income Tax Returns; and his service in the military.

The adverse factor relative to the instant petitioner consists of his criminal conviction, an admittedly serious offense for which the petitioner expressed sincere remorse and for which he served his sentence without further incident. The Immigration Judge conducted a thorough analysis of the documentary evidence presented and had the benefit of weighing the demeanor and credibility of all witness testimony presented. The Immigration Judge balanced the information presented and determined the petitioner merited a section 212(c) waiver.

When one examines the totality of factors presented, both the positive and adverse, the petitioner maintains that the Immigration Judge made the correct decision and the Board did not follow its own regulations and failed to conduct an impartial and objective examination as provided for by prevailing case law. The Board has held that applications involving an alien with a criminal record must be evaluated on a case-by-case basis. See Matter of Edwards, 20 I & N Dec. 191 (BIA 1990); Matter of Buscemi, supra.; Matter of C-V-T-, supra.; and

Matter of Marin, supra. The instant petitioner maintains that this was not performed in his case and, as such, the Board failed to follow its own regulations.

II. THE CIRCUIT COURT OF APPEALS HAS JURISDICTION TO REVIEW A CHALLENGE TO A FINAL ORDER OF REMOVAL ENTERED BY THE BOARD OF IMMIGRATION APPEALS WHERE THE ALIEN HAS COMMITTED A CRIME INVOLVING MORAL TURPITUDE.

The Immigration Judge granted a section 212(c) waiver to the instant petitioner by determining that the positive equities so warranted this relief. The Government appealed the decision to the Board and the Board sustained the appeal. The Board entered an order of removal to Ecuador and the petitioner timely appealed to the United States Court of Appeals for the Third Circuit. The Government filed a motion to dismiss for lack of jurisdiction and the Circuit Court granted the motion. The petitioner contends the Circuit Court erred as the Court has the jurisdiction to review such cases.

The federal courts are deeply divided over the question presented as to whether 8 U.S.C. § 1252(a)(2)(C) strips them of jurisdiction over the substantial constitutional claims of criminal aliens. The Ninth Circuit and the Third Circuit have held that courts of appeals are precluded from considering the constitutional claims of criminal aliens on direct review. See Chant v. Ashcroft, No. 02-71981, 2003 WL 21782679 (9th Cir. 2003) (constitutional challenges relating to criminal aliens convicted of one of the enumerated offenses must be

raised in district court through habeas petitions); Alibutod v. Ashcroft, No. 02-71636, 2003 WL 21500045 (9th Cir. 2003) (holding that the court lacked jurisdiction to consider the petitioner's constitutional claims). The Ninth Circuit did acknowledge that its decisions on this issue conflict with the holdings of other courts that have held that appellate courts do retain jurisdiction to review constitutional challenges by aliens convicted of aggravated felons. Cedano-Viera v. Ashcroft, 324 F.3d 1062 (9th Cir. 2003) at n.6, citing Balogun v. Ashcroft, 270 F. 3d 274, 278 n.11 (5th Cir. 2001). The Third Circuit concluded similarly in Liang v. INS, 206 F.3d 308 (3rd Cir. 2000) by determining that § 1252(a)(2)(C) precluded their review of any final order of removal against an alien who was removable by reason of having committed certain criminal offenses.

By contrast to the Third and Ninth Circuits, the Seventh, Eighth, and Eleventh Circuits have reached the opposite conclusion and have held that a criminal alien's substantial constitutional challenges to an order of removal can be reviewed directly by a federal court of appeals. The Seventh Circuit, in a recent decision, reaffirmed this finding and continued to assert its jurisdiction in this area. See Robledo-Gonzales v. Ashcroft, 342 F.3d 667, 679-81 (7th Cir. 2003). Soon after the passage of IIRIRA, this circuit recognized that § 1252(a)(2)(C) did not operate as a complete bar to judicial review of BIA decisions. In LaGuerre v. Reno, 164 F.3d 1035 (7th Cir. 1998), the court noted that, despite this provision, courts of appeals maintained the power to consider constitutional issues and to correct "bizarre miscarriages of justice." Id. at 1040. The Eleventh Circuit has also held that jurisdiction is maintained in those cases involving substantial constitutional challenges to the

Immigration and Nationality Act. See Moore v. Ashcroft, 251 F.3d 919, 923 (11th Cir. 2001), citing Galindo-Del Valle v. U.S. Attorney General, 213 F.3d 594, 598 (11th Cir. 2000). The Eighth Circuit has recently joined these courts and concluded that the court retains jurisdiction to consider substantial constitutional challenges to the Immigration and Nationality Act. Vasquez-Velezmoro v. INS, 281 F.3d 693, 696 (8th Cir. 2002).

This question raised by the instant petitioner has substantial national importance and requires resolution by this Court. Failure to resolve it promptly will cause continued confusion in the lower courts. The non-uniformity of procedural law is intolerable in the immigration context because this area of law is within the purview of federal authority. Moreover, intervention by this Court is critical due to the Third Circuits's erroneous interpretation of 8 U.S.C. §1252(a)(2)(C) in that it now lacks the jurisdiction to review substantial constitutional claims. The lower court concluded that §1252(a)(2)(C) precluded jurisdictional review over claims raised by criminal aliens. The Supreme Court, however, concluded that jurisdictional statutes should not be interpreted to preclude judicial review of constitutional issues unless the statute explicitly and unambiguously so states. See Webster v. Doe, 486 U.S. 592, 603 (1988). Section 1252(a)(2)(C) contains no specific language precluding review of substantial constitutional claims and, therefore, cannot be interpreted as halting or impeding a federal court's jurisdiction over such issues. Such direct review by the circuit courts was the only means by which aliens could challenge an order of deportation prior to the enactment of the new legislation, namely the Illegal Immigration Reform and Responsibility Act, 110 Stat. 3009-546, 8 U.S.C. § 1105(a). A reading of §1252(a)(2)(C)

illustrates that Congress did not intend to preclude review by the courts of appeals of substantial constitutional claims raised in direct review petitions.

The Supreme Court in Calcano-Martinez v. INS, 533 U.S. 348 (2001) stated that "the scope of § 1252(a)(2)(C) is not entirely clear" and that "though the text of the provision is quite broad, it is not without its ambiguities" and the Court made the following observation concerning IIRIRA's bar to judicial review:

> Throughout this litigation, the Government has conceded that the courts of appeals have the power to hear petitions challenging the factual determinations thought to trigger the jurisdiction-stripping provision (such as whether an individual is an alien and whether he or she has been convicted of an "aggravated felony" within the meaning of the statute). In addition, the Government has also conceded that the courts of appeals retain jurisdiction to review "substantial constitutional challenges" raised by aliens who come within the strictures of § 1252(a)(2)(C).

Id. at 350 n.2.

This finding of ambiguity by the Court supports the instant petitioner's argument that § 1252(a)(2)(C) does not preclude the courts of appeals from review of substantial constitutional claims.

CONCLUSION

Respectfully, the petitioner requests this Court direct that this case be remanded for the purposes of vacating the order of removal entered by the Board which was caused by the Board's failure to follow its own published regulations and of the error by the Third Circuit in concluding that it lacked the jurisdiction to review petitioner's claim. Based on the foregoing, it is respectfully requested that the petition for a writ of certiorari be granted.

Respectfully submitted,

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EPS-44 **May 18, 2004**

RELATED TO EPS-34

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **04-1899**

OLMEDO EMILO ROMERO

VS.

JOHN ASHCROFT

(AGENCY NO. A31 364 907)

Present: SMITH, FISHER AND STAPLETON, CIRCUIT JUDGES

Submitted are:

(1) Petition for review;

(2) Respondent's response to Court order and motion to dismiss; and

(3) Petitioner's response to the Court's Order of April 19, 2004 in the above-captioned case.

Respectfully,

MMW/JAF/zm/ch Clerk

ORDER

The Government's motion to dismiss is granted, and the petition for review is dismissed for lack of subject-matter jurisdiction. Because Petitioner is an inadmissible alien convicted of a crime of moral turpitude, a fact that he conceded in the administrative removal proceedings, INA § 242(a)(2)(C) deprives us of jurisdiction to entertain the petition for review. See Liang v. INS, 206 F.3d 308, 323 (3d Cir. 2000). Even if we had jurisdiction over the petition for review, we would lack jurisdiction to consider Petitioner's sole argument--that the Board of Immigration Appeals erred in denying discretionary relief under former INA § 212(c). INA § 242(a)(2)(B)(ii); see generally Mendez-Moranchel v. Ashcroft, 338 F.3d 176, 178 (3d Cir. 2003) (on the court's lack of jurisdiction to review discretionary decisions); see also Palma-Rojas v. INS, 244 F.3d 1191, 1192 (9th Cir. 2001) (holding that the court lacked jurisdiction, under a similar transitional-rules provision, over a discretionary denial of § 212(c) relief).

By the Court,

/s/ D. Brooks Smith
Circuit Judge

Dated: June 2, 2004

CH/cc: John D. Perez, Esq.
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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

OLIVIEDO ROMERO, **File No. A31 364 907** **Newark Office** **Petitioner,** **v.** **JOHN ASHCROFT, ATTORNEYGENERAL USA, and U.S. BOARD OF IMMIGRATION APPEALS AND USCIS DISTRICT DIRECTOR** **Respondents.**	**PETITION FOR REVIEW** **INS ORDER**

Olmedo Romero hereby petitions the court for review of the Order of the Board of Immigration Appeals (Board) entered on March 11, 2004 reversing the decision below. (A copy of the Board's Order is attached hereto as Exhibit A). The Immigration Judge granted petitioner's application for a section 212(c) waiver and the Government appealed this decision to the Board. (A copy of the Order and Decision of

the Immigration Judge are attached hereto as Exhibits B and C respectively).

The petitioner is a 46 year old male from Ecuador who, at the age of 15, was admitted into the United States as a lawful permanent resident on February 13, 1972. The petitioner completed his education and then enlisted in the United States Army in November 1980. The petitioner was stationed in Germany and it was while serving in Germany that the petitioner was arrested on January 19, 1984 and charged with the sexual assault of an adult woman. The petitioner was sentenced to a 4 year prison term of which he served 37 months and then reported to a Probation Officer for 11 months. The petitioner received a dishonorable discharge from the Army. Following his release, the petitioner married and raised a step-daughter as his own child. The petitioner maintained employment in order to support his family and documentation was provided to the Court outlining same. It was also noted that the petitioner has extensive family residing lawfully in the United States, including his parents and siblings, with whom the petitioner shares a very close and loving relationship.

The petitioner was served with a Notice to Appear on August 1, 2002 and was charged with being subject to removal due to his criminal conviction. During proceedings before the Immigration Judge, testimony was presented by the petitioner and his family. The Immigration Judge, after weighing all the evidence and testimony, granted the petitioner's application for a section 212(c) waiver. The Government appealed to the Board and the Board sustained the appeal and vacated the order of the Immigration Judge. The Board ordered the petitioner removed to Ecuador. It is the contention of the petitioner that the Board abused its discretion by vacating the order of the Judge who had the benefit of the direct testimony of all witnesses. The Judge balanced the positive and. adverse factors pursuant to the

decisions rendered in *Matter of Mann,* 16 I&N Dec. 581 (BIA 1978); *Matter of Roberts,* Int. Dec. 3148 (BIA 19910; and *Matter of Edwards,* Int Dec. 3134 (BIA 1990). The petitioner maintains that a decision of the Board may be remanded if it fails to adequately consider the evidence in the record which favors the applicant. *Tipu v. INS,* 20 F.3d 580 (3rd Cir. 1994). The Immigration Judge noted several times the positive family support and the strong evidence of rehabilitation the petitioner has shown as the criminal offense occurred over 20 years ago and the petitioner has not had any other convictions.

The petitioner seeks relief from the order of removal entered by the Board when the Board abused its discretion by vacating the order of the Immigration Judge. The petitioner respectfully petitions this court and seeks to offer proofs that the decision of the Board be reversed and the order of the Judge be reinstated as the petitioner demonstrated he warranted a favorable exercise of discretion in accordance with section 212(c) of the Immigration and Nationality Act.

Respectfully submitted,

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SERVICE LIST

Provided below is the list of respondents so named in the enclosed Petition for Review of BIA Order pertaining to Olmedo Romero and upon whom the court will effectuate proper service of the Petition for Review and Motion for a Stay of Removal:

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Dated: April 1, 2004

/s/John D. Perez, Esquire
John D. Perez, Esquire
Attorney for Petitioner

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

OLMEDO ROMERO,	)	
File No. A31 364 907	)	
Newark Office	)	
	)	
	)	
Petitioner,	)	
	)	
v.	)	**Docket No.**
	)	
JOHN ASHCROFT,	)	
ATTORNEY GENERAL	)	
USA, and U.S. BOARD	)	
OF IMMIGRATION	)	
APPEALS and USCIS	)	
DISTRICT DIRECTOR	)	
	)	
Respondents.	)	

PETITIONER'S MOTION FOR A STAY OF REMOVAL AND IMMEDIATE RELEASE FROM CUSTODY PENDING RESOLUTION OF PETITION FOR REVIEW FOR RELIEF UNDER INA SECTION 212 (c) WAIVER

Petitioner, Olmedo Romero, through counsel, hereby moves this Court for an Order staying his physical deportation from the United States until such time as the Court has issued a final decision on the Petition for Review seeking relief under section 212(c) of the Immigration and Nationality Act (hereinafter referred to as the INA or Act), a request for a waiver of a criminal conviction. In support of such Motion, Petitioner states through counsel as follow:

1. The Petitioner was granted a section 212(c) waiver by the Immigration Judge and the Government appealed to the Board of Immigration Appeals (Board). The Board on March 11, 2004 vacated the decision of the Judge and entered an order of removal, finding the petitioner did not warrant a section 212(c) waiver.

2. Petitioner has on this date filed a petition for Review before this Court pursuant to 8 U.S.C. § 1252(a). Pursuant to statute, the Petition for Review must be filed within thirty days of the final administrative order of deportation. In such cases, filing the Petition for Review and service upon the government does not act automatically to stay the Petitioner's deportation from the United States during the pendency of the Petition for Review.

3. The Petitioner is therefore subject to being physically removed and deported from the United States at any time, regardless that a Petition for Review is currently pending before this Court. On or about April 1, 2004, the Petitioner was picked up at his home by officers of the United States Immigration and Customs Enforcement Services (USICE) and is presently being detained in the Hudson County Correction Center in Kearny, New Jersey.

4. Petitioner contends that the Board abused its discretion by vacating the order of the Immigration Judge and ordering petitioner removed to Ecuador, contrary to statute and regulations and a violation of Petitioner's due process rights.

5. Petitioner has a substantial liberty interest at stake—his right to remain in this country with his family with whom he is extremely close. The record indicates that the Petitioner presented documentary and direct testimony regarding his strong ties to this country, evidence of rehabilitation following his criminal conviction of some twenty years ago, and maintaining employment and filing Income Tax Returns. A denial of a Stay of Removal would allow the USICE to act to deport him and render his Petition for Review moot.

6. The criminal conviction for which Petitioner was involved occurred in 1984 when the Petitioner was serving in the United States Army and was stationed in Germany. The Petitioner was convicted in the sexual assault of an adult woman and was sentenced to 4 years in prison. The Petitioner was ultimately dishonorably discharged from the Army. The Petitioner testified candidly during proceedings as did all his witnesses. The Immigration Judge remarked several times regarding the positive factors presented by the Petitioner and the strong evidence of rehabilitation. The Judge weighed all the evidence and granted the section 212(c) waiver.

7. No relief has been sought in the district court because the Court of Appeals is the proper court in which to seek this Stay. Petitioner, therefore, seeks the protection of this Court and asks that the Court issue and Order granting a Stay of Removal during its consideration of the Petitioner's Motion for Stay and during its Consideration of the Petition for Review.

WHEREFORE, the Petitioner seeks the protection of this Court and respectfully requests that this Court issue an Order granting a Stay of Removal during this Court's consideration of the Petition for Review seeking to reverse the order of the Board of Immigration Appeals and reinstate the order of the Immigration Judge granting the Petitioner relief under section 212(c) of the Immigration and Nationality Act. Petitioner additionally seeks the immediate release from custody as he is

not governed by the mandatory detention provisions of the Immigration and Nationality Act.

Respectfully submitted,

/s/John D. Perez, Esquire
John D. Perez, Esquire
Attorney for Petitioner
41-51 Wilson Avenue, 2nd Floor
Newark, New Jersey 07105
(973) 522-1222

Dated: April 1, 2004

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OLMEDO ROMERO,	)
	)
Petitioner,	)
	)
v.	) No. 04-1899
	)A31-364-907
JOHN ASHCROTF, Attorney General,)	
	)
Respondent.	)

RESPONDENT'S OPPOSITION TO MOTION FOR STAY OF REMOVAL

On April 1, 2004, petitioner, Olmedo Romero ("Romero"), filed a motion for a stay of removal and immediate release from custody pending resolution of his petition of review of the March 11, 2004, order of the Board of Immigration Appeals ("BIA" or "Board") denying him waiver of inadmissibility under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c)(1992).

See Motion for a stay of removal dated April 1, 2004. Respondent opposes the motion for a stay of removal, and respectfully requests that it be denied because Romero has failed to establish by clear and convincing evidence that execution of his removal order is prohibited as a matter of law. See INA § 242(f)(2), 8 U.S.C. § 1252(f)(2).

PROCEDURAL BACKGROUND

Romero is a native and citizen of Ecuador who appeared before an immigration judge on March 31, 2003, and was granted a waiver of inadmissibility under INA § 212(c). See Decision of the Immigration Judge dated March 31, 2003. On March 11, 2004, the Board vacated the immigration judge's decision stating that the heinous nature of the crime Romero was sentenced and served jail

time for, is not offset by the equities necessary to warrant INA § 212(c) relief. Romero timely filed a petition for review with this Court as well as a motion for stay of removal pending resolution of the motion for review. See Motion for Review dated April 1, 2004.

The government hereby notifies the Court that Romero is scheduled to be removed from the United States on April 22, 2004.

ARGUMENT

THE COURT CANNOT STAY ROMERO'S REMOVAL BECAUSE HE HAS NOT SHOWN BY CLEAR AND CONVINCING EVIDENCE THAT HIS REMOVAL IS PROHIBITED AS A MATTER OF LAW

The Court must deny Romero's stay request because he presents neither evidence nor argument in support of his request that shows clearly and

convincingly that his removal is prohibited as a matter of law. Section 242(f)(2) of the INA, 8 U.S.C. 1252(f)(2), governs the granting of a stay in cases such as this one, where the alien was placed in removal proceedings on or after April 1, 1997. See INA § 242(f)(2), 8 U.S.C. § 1252(f)(2); see also IIRIRA § 306(c)(l) and 309(a) (providing for effective date of IIRIRA). Section 242(f)(2) provides:

> Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

INA § 242(f), 8 U.S.C. § 1252(f). Romero makes no attempt, in either his petition for review or motion for stay of removal, to show "by clear and convincing evidence that the entry or execution" of

his removal order is "prohibited as a matter of law." Such a showing is necessary under section 242(f)(2) of the INA, 8 U.S.C. § 1252(f)(2). In his motion, Romero simply states that he has a substantial liberty interest at stake: the right to remain in this country with his family with whom he is extremely close. See Motion for Stay of Removal. Romero cites no authority to demonstrate that this claim establishes an error of law that is sufficient for the Court to grant a stay of removal. See Motion for Stay of Removal. In fact, he fails to even articulate the errors he asserts render the entry or execution of his removal order "prohibited as a matter of law." Such a "perfunctory request for a stay is wholly insufficient to meet the requirements for a stay." Abassi v. INS, 143 F.3d 3 513, 514 (9th Cir. 1998). The Court should therefore deny Romero's motion

for a stay of removal.

Furthermore, the Court need not stay Romero's removal to preserve its jurisdiction to consider the petition for review. Even if removed, his petition for review will still be properly before the Court. Under section 242 of the INA, 8 U.S.C. § 1252, as amended by IIRIRA, the departure of an alien from the United States no longer divests the Court of jurisdiction over the removal order. Before IIRIRA' s enactment, and in cases controlled by IIRIRA's transition rules, the Court would lose jurisdiction over a petition for review if the alien left the United States while the petition was pending, regardless of whether the alien's departure was voluntary or the result of deportation. See IIRIRA § 309(c)(4); INA § 106(c), 8 U.S.C. § 1105a(c) (1994) ("An order of deportation or of exclusion

shall not be reviewed by any court. if [the alien] has departed from the United States after the issuance of the order."). This case, however, is governed by IIRIRA's permanent rules regarding judicial review, which contain no provision comparable to the "departure" clause in former INA § 106(c). generally LNA § 242, 8 U.S.C. § 1252. Accordingly, Romero will not be denied review on the merits of the BIA' s order if his motion is denied.

CONCLUSION

For the foregoing reasons, the Court should deny petitioner Romero's stay of removal.

Respectfully submitted,
PETER D. KEISLER,
Assistant Attorney General
Civil Division

CHROSTOPHER C.
FULLER Senior Litigation
Counsel

LYLE D. JENTZER
Lead Attorney
U. S. Department of Justice
Civil Division
Office of Immigration
Litigation
P. 0. Box 878
Ben Franklin Station
Washington, D.C. 20044
202-305-0192

Dated: April 6, 2004

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I certify that on April 6, 2004, I caused two copies of **RESPONDENT'S OPPOSITION TO MOTION FOR STAY OF REMOVAL** to be served upon petitioner, by placing it in a mail room of the United States Department of Justice for same-day delivery, postage pre-paid, addressed, as follows:

John D. Perez, Esq.
41-51 Wilson Avenue, 2nd floor
Newark, New Je sey 07105

*/s/*Lyle D. Jentzer

LYLE D. JENTZER
United States Department of Justice
Civil Division
Office of Immigration Litigation

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Mazzocchi, Frank
56-58 Ferry Street,
Newark, NJ 07105-0000

Office of Chief Counsel—
ICE/NE
970 Broad Street-Room 1104B
Newark, NJ 07102

Name: ROMERO CAMPOVERDE, OLMEDO EMILIO
A31 -364-907

Date of this notice: 03/11/2004

Enclosed is a copy of Board's decision and order in the above-referenced case.

Sincerely,

Frank Krider
Acting Chief Clerk

Enclosure

Panel Members:
HOLMES, DAVID B.
HURWITZ, GERALD. S
MILLER, NEIL P.

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A31 364 907 - Newark Date: MAR 11 2004

In re: OLMEDO EMILIO ROMERO-CAMPOVERDE

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Frank Mazzocchi,Esquire

ON BEHALF OF DHS: Christopher P. Brundage
Assistant Chief Legal Counsel

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(I), I&N Act [§ 8 U.S.C 1182(a)(2)(A)(i)(I)] - Crime involving moral turpitude

APPLICATION: Waiver of inadmissibility

The Department of Homeland Security ("the DHS," formerly the Immigration and Naturalization Service) appeals an Immigration Judge's March31, 2003, decision granting the respondent in the exercise of discretion a waiver of inadmissibility under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. §1182(c) (1992). We will sustain the appeal and order the respondent removed to Ecuador.

A31 364 907

We adopt Immigration Judge's summary of the evidence. We agree with him that the gravity of the respondent's conviction in the military for rape and unlawful kidnapping resulting in a sentence to a term of imprisonment of4 years requires him to demonstrate unusual or outstanding equities to warrant section 212(c) relief in the exercise of discretion (Exh. 13). *See Matter of Edwards,* 20 I&N Dec. 191, 195 (BIA 1990) (such a showing may be mandated by a single serious crime). We further agree with him that the respondent has demonstrated unusual or outstanding equities despite the argument of the DHS, including evidence of rehabilitation in that he has not been convicted of another crime since 1984. *See Matter of Arreguin,* 21 I&N Dec.38, 40-4 1 (B1A *1995)* (acceptance of responsibility and remorse, long lawful permanent residence, property ties, payment of income taxes, steady history of employment).

However, the respondent's showing does not compel a favorable exercise of discretion. *See Matter of Edwards, supra,* at 196. We agree with the DHS this is a case in which the adverse considerations are so serious that a favorable exercise of discretion is not warranted. *Id.* The sworn statement given by the respondent the day after the offense discloses that the gang rape of the spouse of another soldier would not have occurred, but for his actions. It is apparent from his admissions that he and his two fellow soldiers took advantage of an obviously inebriated woman who followed them to his car. But beyond this circumstance, he was the one who asked one of his compatriots to constrain her after she kicked the dashboard and the windshield in an apparent attempt to get out of the car. He was the one that then drove the car and found a parking lot after some effort, removed her pants and panties while she cursed him, performed sexual intercourse with her even though she initially fought him, and eventually changed seats in the car to allow a third person to rape her.

Against the heinous nature of the crime, we balance the respondent's period of permanent residence of 32 years, the passage of 20 years since commission of the gang rape, the absence of any convictions since his release from prison after

serving 37 months, his steady employment history, his close family ties in the United States, his 1/2 ownership of a house, his provision of the majority of the income between him and his wife, the absence of family ties in Ecuador, his wife's refusal to move to Ecuador, and the significant economic problems in that country. However, in weighing these equities, we also consider that he entered the United States as a teenager. He speaks Spanish. He has no biological children. The stepdaughter that he raised is an adult and married. His wife is employed. There is no evidence that the stepdaughter and her husband, who own the other half of the house, could not help his wife in meeting the. monthly mortgage payment. The respondent has experience as a truck driver which he has not shown that he could not do in Ecuador despite the economic problems there. His wife, mother, stepdaughter and siblings can visit him in Ecuador since they are either United States citizens or lawful permanent residents In sum, we do not find that the equities overcome his instigation and commission of such a traumatizing and potentially violent crime against a vulnerable victim. *See Tipu v. INS*, 20 F.3 d 580, 583 (3rd Cir.1994) (recognizing that the Board has held that one of the adverse considerations may be determinative); *cf. Matter ofJean*, 23 I&N Dec. 373, 384 (A. G. 2002) (this country will not offer its embrace to aliens who engage in violent acts).

Therefore, we determine that the Immigration Judge erred in granting the section 212(c) waiver to the respondent. Since the respondent has not contested his deportability and requested no other relief, we enter the following orders.

ORDER: The appeal is sustained and the Immigration Judge's grant of section 212(c) relief is vacated.

FURTHER ORDER: The respondent is ordered removed to Ecuador.

/s/ signature
FOR THE BOARD

IMMIGRATION COURT
970 BROAD STREET, ROOM 1135
NEWARK, NJ 07102

In the Matter of

Case No.: A31 364 907

ROMERO CAMPOVERDE, OLMEDO EMILLO
Respondent

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on Mar 31, 2003. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[ ] The respondent was ordered removed from the United States to or in the alternative to

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to alternative to

[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $_____ with an alternate order of removal to

[ ] Respondent's application for asylum was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for withholding of removal was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for cancellation of removal under section 240A(a) was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for cancellation of removal was ( ) granted under section 240A(b)(i) ( ) granted under section 240A(b)(2) ( ) denied ( ) withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[X] Respondent's application for a waiver under section 212(c) of the INA was (X) granted ( ) denied ( ) withdrawn or ( ) other.

[ ] Respondent's application for adjustment of status under section_____ of the INA ( ) granted ( ) denied ( ) withdrawn. If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a ___ _____ until _____.

[ ] As a condition of admission, respondent is to post a $_____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other:

Date: Mar 31, 2003

Appeal: Waived/(Reserved) Appeal Due By: 4/30/03

/s/HENRY S. DOGIN
HENRY S. DOGIN
Immigration Judge

Additional Copy

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Newark, New Jersey

File No.: a 31 364 907 March 31, 2003

In the Matter of

OLMEDO EMILIO)

ROMERO CAMPOVERDE) IN

) REMOVAL PROCEEDINGS

CHARGE:

Conviction, crime involving moral turpitude-Section 212(a)(2)(A)(i)(1) Immigration and Nationality Act.

APPLICATIONS: Waiver of inadmissibility -- Section 212(c) immigration and Nationality Act.

ON BEHALF OF RESPONDENT:
Frank Mazzocchi, Esq.
56-58
Newark, New Jersey 07105

ON BEHALF OF SERVICE:
Christopher Brundage, Esq.
District Counsel
INS New Jersey

MAY 29 2003

OPAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 45 year-old male native and citizen of Ecuador who was admitted for a lawful permanent resident to the United States on February 13, 1972. He was subsequently convicted, while in the United States Army, on January 19, 1984, convicted in the United States Military Court in Fulda, Germany for the offense of rape and violation of the Uniform Code of Military Justice Article 20 and convicted in the U.S. Military Court, Fulda, Germany for the offense of unlawfully kidnapping, violation of the Uniform Code of Military Justice Article 134, also on that date. Both of these crimes arriving but of the same incident and the same criminal conduct.

Subsequent to his conviction, the respondent left the United States and returned as a returning lawful permanent resident arriving in the United States at Newark, New Jersey International Airport via U.S.A. Airlines, flight U.S.A. 3000 on May 19, 2002. The respondent was served with the charging document, the Notice to Appear, on August 1, 2002 alleging that he was convicted of a crime involving moral turpitude in violation of Section 212(a) (2) (A) (ii) (I) of the Immigration and Nationality Act. The respondent, through counsel, admitted the allegations in the Notice to Appear and conceded that he was removable. The charges are proven; removability has been established. The respondent seeks relief from removal and petitions for a waiver of inadmissibility under Section 212 (c). The waiver was filed with the Court on December 13, 2002.

THE TESTIMONY

The respondent testified that he was born on July 26, 1957 in Jauregui, Ecuador (phonetic sp.). He came to the

United States at the age of 15 years having been sponsored by his mother. He and his family came to the United States, living in New York, where he initially went to school. Ultimately, the family moved to New Jersey, and he graduated from Irvington High School. The respondent has many siblings in the Unite States: 3 brothers, 4 sisters. Three of those are U.S. citizens; the others are lawful permanent residents. His mother is a U.S. citizen and resides in Elizabeth, New Jersey. The respondent is married to one Jennifer Romero, and they had been married since June 2, 1991 here in New Jersey and had been residing continuously together. Apparently Ms. Romero had a child with a previous husband who she no longer has any communication or connection with. The respondent's daughter, also Jennifer, in effect was raised by the respondent as a stepdaughter, although she calls him father. Jennifer, the stepdaughter of the respondent and the daughter of his wife Jennifer, also has her own child, a 3-year-old girl. The respondent has no relatives in Ecuador. All of 'the family is in the United States. Only one permanent resident of the United States, a sister, occasionally goes to Ecuador because there is a child in school. In other words, all of the family is here in the United States and apparently has a very close relationship.

The respondent, with his wife and stepdaughter and stepson-in-law, owns a home in Secaucus, New Jersey, and he splits the mortgage with the rest of the family. He pays $1,140 a month on that mortgage.

The respondent has always been steadily employed, works as a truck driver delivering water for the Evans Company in Moonachie, New Jersey and has been doing this for the past four years and has a salary of $38,000 a year. His wife, Jennifer, works at a furniture store, earns between

14 and $15,000 a year. Apparently all of the income tax of the family, of Jennifer and the respondent, have been filed regularly and have been paid.

The respondent testified that he has been convicted on one occasion, and that occasion arose as a result of his military service with the United States Army. He joined the United States Army on November 19, 1980, enlisting in the service. He received his Basic Training at McClellan base in Alabama, and after a few months he was detached to Germany where he spent the next. three years. He was a specialist specializing in ammunition. In March of 1981 he was detached to Germany. At some point in the year 1983, or about September of that year, while the respondent and a couple of his service buddies were drinking in a disco, he met a Korean woman, and they agreed to go home with her. Apparently the two other military Army men took the girl in a car, and apparently she was raped by the respondent and one of the other service men after having gotten out of the car. The respondent testified that the next day he was arrested when she made a complaint to the authorities. Apparently she was married to an Army Sergeant at another base other than the respondent's base in Germany. The respondent testified that the two other servicemen, Silva and Lablanc (phonetic sp.), who were also involved in the accosting of the girl and the rape, were also charged in a court-martial. All three were convicted on pleas of guilty. Silva received three years, apparently. According to the respondent, he was not involved in the rape. Lablanc received a sentence of five years. Apparently he also raped the girl. The respondent received a four year sentence. He had hired a civil lawyer, and all three of the men pled guilty. The respondent testified he was sentenced to four years confinement, did 37 months hard time at Ft. Leavenworth, Kansas, the leading military prison in the

United States. He also was on parole for another 11 months, and he satisfactorily completed all of the terms and conditions of his parole and was released. The respondent testified he has always been repentant and has always been sorry for what he had done. The respondent testified that he was never convicted of any other crime, although he was arrested on one occasion in 1998 for patronizing a prostitute. The charge was dismissed.

The respondent's wife, Jennifer Romero, testified that she has known the respondent many years. They were actually married on June 2, 1991. She has one child, a daughter Jennifer, who is 24 years of age. She testified the respondent and the witness, Jennifer Romero, his wife, were married when young Jennifer was about 11 years of age, and she and the witness, the wife, have no contact with the natural father. The respondent has raised the daughter as his own. He is like a father to young Jennifer, the stepdaughter, and is also, like a true grandfather to Jennifer's, the daughter, daughter. The respondent is also very close to his mother. The respondent's wife, Jennifer, testified that they have a close, loving relationship. He is a very *strong* family man. He is honorable. He is honest. And he had actually explained what had happened to him, the event in the disco, where he had met a Korean woman and that he was charged with and pled guilty to rape in the service. He had told her this early on in their relationship before their marriage. The respondent's wife, Jennifer, testified that she has no idea what she would do if the respondent were to be deported, in terms of what she would do and or where she would relocate. She testified she is a Colombian. She has never been to Ecuador.

The respondent's wife apparently had gone down to the Dominican Republic on vacation with the respondent, her

daughter and granddaughter when the respondent was accosted by the Immigration Service in the summer of 2002 and placed in proceedings and taken into custody. According to the respondent, he had made four other trips from 1992 to 2002 out of the United States and had never been stopped by the Immigration Service. It was only in the year 2002 that they took him into custody and placed him in proceedings.

The respondent's mother testified that she is very close to her son. She believes that he is a very strong family person. He is very respectful. He is very hard working. She would be devastated if he had to be removed to Ecuador. He is not just, a good son, he takes her to the doctor, he buys family groceries, he takes care of the medicine for her and helps economically to his widowed mother.

The respondent's sister, Maria Aguilar, testified as to the strong close ties with her brother. The brother-in-law, Robert Guirre testified as to the strong family ties. Blanca, Caesar and Yandry RomerQ (phonetic sp.) have all testified as to their close relationship to the respondent, their brother, and to his honesty, his reliability and his good moral character.

FACTUAL ANALYS IS

The respondent seeks a waiver of inadmissibility under Section 212 (c). This is the ultimate act of discretion by an immigration Judge and the ultimate act of humanity that one can give in a situation like this. It is the ultimate balancing of the equities. One's life is in the Judge's hands. There is no other type of procedure in our Immigration Law like 212 (c). And the exercise of discretion in a particular case requires consideration of all of the facts and

circumstances involved. This Court must balance the social and humane considerations presented in an alien's favor against the adverse factors evidencing his undesirability as continuing as a permanent resident. The cases are important; Matter of Marin, 16 I&N Dec. 581 (BIA 1978), Matter of Roberts, Int. Dec. 3148 (BIA 1991), and it is the respondent that bears the burden of demonstrating to the Court that he deserves this kind of relief, this kind of forgiveness for criminal acts, this 212 relief. I have weighed everything in this case. I have weighed the respondent's background, his family ties, what he would be facing in Ecuador, what he has done with himself against the one act, the crime, the rape, the kidnapping of the Army Sergeant's wife. Let us analyze all of the factors, and that is what I must do. In analyzing a crime and the nature and circumstances of the ground of exclusion, the Court must examine the presence of significant violations of the criminal law, the nature of the, crime, the recency and the seriousness and the other evidence of bad character. Now, this is a kind of case where the crime is so serious the respondent must show the Court that he has outstanding and unusual equities. It is a heightened showing that is required in a drug trafficker case or a crime involving violence, and this is a crime Involving violence. I have analyzed the bad, and the bad is not good. It is a serious crime. It is a forcible rape. It is a forcible rape of young woman on an Army base with two other individuals. Clearly there was no consent. I cannot excuse the fact that everyone was drinking. I cannot excuse the fact that, apparently if one reads the criminal report, that the girl herself, at least, initiated the overture. I cannot excuse that, because, basically, the respondent and his Army buddies had the responsibility to walk away from this thing and not to rape this woman. So, the crime itself is very serious, for which. he was punished. He received a four year sentence following a court-martial and a plea before the military court resulting in a period of 37 months in Leavenworth prison

prison and 11 months on parole. So that is the serious factor which is an evidence of his continued undesirability- as a pernanent resident. There are no others. I see nothing else in his background that would lead me to believe that he has bad character. The fact that he was arrested on patronizing a prostitute, the charge was dismissed, and there is a presumption of innocence in this country, at least the last I heard. I cannot consider that. Now, I balanced this serious offense and the need to demonstrate outstanding and unusual equities against the respondent's background. I also recognize that there are certain kinds of crimes and criminal misconduct which are so heinous, so serious that they might ultimately outweigh everything that one does good. I am sure the Government would argue that this crime is, however, I find that this is one incident in an individual's life that has been unbelievably exemplary, and I will weigh the factors that I believe are considered favorable. No.1: The crime itself happened over 20 years ago. That is a long time. That is a long time for the Government to seek to punish someone; to seek to deport them. He has not been in trouble or been convicted of any crime and has been working and raising a family for over 20 years. That shows, in and of itself, rehabilitation. There are so many other factors that are positive. He has always been steadily employed. He has always paid his taxes. He has always been an exemplary family man. It is interesting to note that the various epitaphs that have been used by family members seem to fit this man, who I have observed for the last two and half to three hours. Respectful, yes; hardworking, obvious; reliable, certainly; honest. What other Court would see a man testify that he actually touched cocaine to his lips. There is no way anybody could have proven that. That is an honest man. So, all of these feelings this loving family has for him, I have witnessed in this court. Respectful, hardworking, reliable,

honest. They are all here right in- front of me. He owns a home. He has the strongest of family ties; a mother, a widowed mother that he cares for and gives a great deal of attention to in the way of taking care of her financially, in the way of providing medicine for her, taking her to the doctor. It is obviously a loving, caring relationship. He has seven siblings, many of whom came to court today to support him. Their love and their caring for him is genuine. I see it; I feel it. Very strong relationship with his wife. They are married 12 years. It is interesting to note, when the daughter said, after she had been sworn in and given her name, I asked her to identify the gentleman seated next to Mr. Mazzocchi, she said, that is my father. She didn't say that is my stepfather. That is my father. He has raised her. He has been an exemplary force for her, and it is obviously a loving, strong relationship with the stepdaughter, filling in for the husband that disappeared, the father of young Jennifer, 24 years of age, herself a mother. That is important. That shows the caring for the family is evidence of rehabilitation, is evidence of his desire to reform himself and to wipe out the terrible blot that occurred while in the military in 1983. The ties are here in the United States. There are about 30 people in this courtroom today, and it is obvious the strength and the bond that is here in this country. There is nothing for him in Ecuador. There is not a family member that permanently resides in Ecuador. It is also interesting to note in the Country Reports, which were admitted as Exhibit No. 14, that not only would there be a terrible wrenching and "devastating", to use the mother's word, effect on the family if he were to leave, but there would be a severe economic problem for them: The loss of his income. According to the Country Reports, 71 percent of the citizens live in poverty and 30 percent are indigent with almost a total lack of resources. So, it is very possible he could get a job, but it is also strongly

possible he is not going to come anywhere near the type of income that he makes or anywhere near the type of support that he can give this family if he had to be deported to Ecuador. Another problem is, in Ecuador, what is going to happen to the wife? She is a Colombian. She does not know what is going to happen. She is going to have to make Hobson's choice, which is the worst kind of choice. Do I stay here without my husband, or do I go with him to Ecuador, a country she has never been to. And that is a terrible choice for her to make. Even having to face that creates terrible emotional stress. This Court finds that the respondent has the outstanding and unusual equities. This Court finds that, in spite of the fact that is a serious crime, it ha happened over 20 years ago. He came to the United States when he was 15 or 16 years of age, a youngster. He has been a permanent resident for 31 years. I have not reached the point as a Judge where I can ignore the tremendous equities, the tremendous family ties, the terrible hardship to this family. I recognize that he was involved in a serious crime, but there is such a thing as rehabilitation. There is such a thing as redemption. And I do not believe that Justice Stevens, when he said that 212(c) was still available for certain kinds of people, would have ignored this kind of case. I cannot, no matter what the atmosphere we are living in right now. 212(c) is still available, and I believe this is the kind of case, as serious as the crime was, that it should be granted, and I will do that.

ORDER

Respondents application for a waiver of inadmissibility under Section 212(c) is granted.

HENRY S. DOGIN
Immigration Judge

A 31 364 907

March 31, 2003

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE HENRY S. DOGIN, in the matter of:

OLMEDO EMILIO ROMERO CAMPOVERDE

A 31 364 907

Newark, New Jersey

is an accurate, verbatim transcript of the cassette tape as provided by the Executive Office for Immigration Review and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/Carol F. Weiszharr
Carol F. Weiszhaar,
Transcriber

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June 12, 2003
(completion date)

By submission of this CERTIFICATE PAGE, the Contractor certifies that a Sony BEC/T-147, 4-channel transcriber or equivalent, as described in Section C, paragraph C.3.3.2 of the contract, was used to transcribe the Record of Proceeding shown in the above paragraph.